IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 83

RICHARD McALLISTER,

Petitioner,

vs.

MAGNOLIA PETROLEUM COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT

REPLY BRIEF FOR PETITIONER

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TEXAS STATUTES

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Additional Statement

In view of the position taken by Respondent in its Counter Proposition Number Two, we believe a reply will be of aid to the Court. Respondent's argument may be divided as follows:

(1) Petitioner did not submit properly drawn issue or definition to the trial court (Respondent's brief, page 11).

(2) A court cannot consider ex parte affidavits of the jurors (Respondent's brief, page 13).

(3) There was no finding by either the jury or the Court of water upon the steps from which Petitioner fell (Respondent's brief, pages 13, 15).

(4) The condition of water upon the steps was a transitory one; hence Respondent is not liable (Respondent's brief; page 15).

Argument

Respondent's argument on Counter Proposition Number One has been anticipated. Petitioner's contention is fully set out in his original brief. We shall, therefore, limit this reply to Respondent's Counter Proposition Number Two.

(1) Petitioner did not submit properly drawn issue or definition to the trial court (Respondent's brief, page 11).

Rule 279 of Texas Rules of Civil Procedure (Appendix A), among other things, provides as follows:

> "Failure to submit a definition of explanatory instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or explanatory instruction has been requested in writing and tendered by the party complaining of the judgment."
>
> (See Commentaries, Vol. 1, R.C. p. 221—"Tender of substantially correct issue and instruction".)

Respondent's argument either overlooks or fails to understand Petitioner's complaint. The complaint was not levelled to Issues Numbers 3 and 14. Indeed, the Court submitted these issues in a form substantially as requested by Petitioner. The complaint is levelled at the *definition* and/or instruction given the jury in connection with these issues, requiring the jury to apply the standard of unseaworthiness to the vessel as a whole (R. 359, 362). Petitioner's requested definition limited the application of the

standard of unseaworthiness to the portholes, or windows, above the stairs leading from the lounge to the galley (Issue No. 3) and to the deck above the galley (Issue No. 14), as pleaded and proven. The Court's submitted definition and instruction is in exactly the same general language as the one requested by Petitioner, the only difference being that the Court's definition required the defect to render the vessel as a whole unseaworthy. Petitioner's definition required only that the condition complained about, i.e., the portholes, or windows, and the deck to be unseaworthy. The definition as submitted by the Court read as follows:

> "You are instructed that by the term 'unseaworthy', as used herein, means that a vessel with its appliances and fittings is not reasonably fit for the purpose for which it is being used. Answer 'Yes', or 'No'" (R. pp. 359, 362).

The definition as requested by Petitioner reads as follows:

> "You are instructed that by the term 'unseaworthy', as used herein, is meant that the portholes over and near the galley stairs leading to and from the lounge of the crewship in question were not reasonably fit for the purpose for which said portholes, or windows, were used."

It is obvious that this difference is one of substance, and such difference is reflected by the inquiry made by the jury to the Court, which inquiry the Court refused to answer (R. p. 419). The jury's question read as follows:

> "Judge Long: In special issue 3 is the term 'unseaworthy' referring to the vessel as a whole or the three windows on the portside? /s/ James H. Brown, Foreman."

The trial court overruled Petitioner's timely exception to the Court's definition, clearly pointing out the reasons for such exception, in accordance with Rule 279, T.R.C.P. (R. 371-373). The requested definition and instruction and the requested issues were in conformity with the evidence and Petitioner's pleadings (R. 7), which described with particularity the unseaworthy condition of the portholes and the deck above the galley.

But Respondent's contention is without merit on still another ground, for even if it be conceded that there might be some technical merit to Respondent's contention that the local rules of practice have not been followed, this Court in *Arnold* v. *Panhandle and Santa Fe Railway Co.*, 353 U.S. 360, 77 S.Ct. 840, has determined that a federally created right cannot be nullified under the name of a local practice. This Court will not accept interpretations that nullify the effect of federal rights.

The case of *Gray County Gas Co.* v. *Oldham*, 238 S.W. 2d 596, relied on by Respondent is no authority for the proposition urged both on the facts as well as the pleading.

(2) A court cannot consider ex parte affidavits of the jurors (Respondent's brief, page 13).

Respondent argues that Special Issues 3 and 14, and their definitions, are so clear and unambiguous that no jury could fail to know that they were limited to the conditions referred to, Issue 2 (portholes) and Issue 13 (deck above the galley), and hence this Court cannot take into consideration the ex parte affidavits of the jury members attached to Petitioner's motion for a new trial. Respondent's statement that no juror could fail to know what these issues 3 and 14 referred and were limited to—the conditions inquired about in Issues 2 and 13—is completely contradicted by the question the jury set out regarding

these very issues. The Court, therefore, need not look to the affidavits to discover that the jurors were misled by the Court's definitions and instructions. The jury's inquiry establishes it without question; and it applies equally to Issue No. 14. (Stipulations, R. 419). The Court's refusal to answer this inquiry left the jury in the same state of confusion which the improper and misleading definition and instruction led them into.

(3) There was no finding by either the jury or the court of water upon the steps from which Petitioner fell (Respondent's brief, pages 13, 15).

The evidence was undisputed that there was sea water on the steps and that it came from the portholes and the deck. Captain Dressel (R. 14) admitted it, stating that the reason precautions were taken to prevent the portholes from leaking was because it was dangerous to those using those steps (R. 18).

"Q. And the reason you did that, you knew it was dangerous for that water to splash on the stairs because somebody might fall and get hurt?

A. Yes, sir."

R. 27:

"Q. When that happened, what, if anything, happened to the area immediately below the portholes or windows, or whatever you may call them?

A. It would get wet.

Q. What would get wet?

A. Well, the deck, the bulkheads, the ladders, anything that might be below those portholes would get wet."

(See also Record pages 31, 37, 38.)

The condition was duly recorded in the vessel's log book (R. p. 17), and it is supported by the testimony of Respondent's witness (R. pp. 262, 264, 265, 268, 271, 278 and 305).

The fact that Respondent's expert witnesses testified that it is more difficult to slip when there is sea water on the steps, or oil, or film on the steps, than when the steps are dry does not establish as a matter of law that Petitioner did not slip and fall by reason of water on the steps. At best the testimony of such experts simply constitutes evidence which the jury could either accept or reject. Such testimony would not establish a fact upon which reasonable minds could not differ. The testimony of the Master, owner *pro hac vice* of the vessel (*The Abangarez*, 60 F.2d 543), testified that sea water on the steps was dangerous because it may cause someone to fall and get hurt. There being no dispute but that water was on the steps the Court properly did not submit such an issue to the jury (Rule 272, T.R.C.P., Appendix B). The sole and only reason the trial court entered judgment for Respondent was that the jury, having answered Issues 3 and 14 in the negative, were instructed not to answer Issues 4 and 15 (proximate cause). It is Petitioner's position that the jury's inquiry (R. 419) demonstrates, without regard to the affidavits of the jurors, that with a proper definition and instruction the answers to Issues 3 and 14 would likely, or at least might have been, answered affirmatively, in which event the jury would have had to answer Issues 4 and 15 (proximate cause).

(4) The condition of water upon the steps was a transitory one, hence Respondent is not liable.

Respondent contends before this Court that even if there was water on the steps proximately causing Petitioner's injury, it was a transitory condition and hence no liability

is imposed on it. Respondent would have this Court adhere to the now discredited doctrine of "transitory unseaworthiness" enunciated in *Cookingham* v. *United States*, 184 F.2d 213, cert. den. 340 U.S. 935, now referred to as the "Cookingham doctrine". This is to misunderstand Petitioner's theory of the case which is not that for some unknown reason, or by some unknown person, water was spilled on the steps thereby rendering the *steps unseaworthy*. Petitioner never made any such contention. On the contrary, the contention is that *the unseaworthy condition of the portholes* over the steps and the *deck above the galley* caused the steps to be wet. Even if the *Cookingham* doctrine would still be the law, it does not apply here since the condition of the portholes and the deck on the J. C. STEPHENS was a long continuing one, of which the Master and other representatives in a supervisory capacity of the employer had knowledge. The correct understanding of "unseaworthiness" is that it applies upon the instant the condition arises. *Poignant* v. *United States*, 225 F.2d 594 (2nd Cir.); *Pope & Talbot* v. *Hawn*, 346 U.S. 406, 74 S.Ct. 202; *Seas Shipping Co.* v. *Sieracki*, 149 F.2d 28, 328 U.S. 85, 66 S.Ct. 872 and *Grillea* v. *United States*, 232 F.2d 919. In any event the *Cookingham* case, *supra*, *Shannon* v. *Union Barge Line Corp.*, 194 F.2d 584, cert. den. 344 U.S. 846, and *Holliday* v. *Pacific Atlantic S.S. Co.*, 99 F.Supp. 173, relied upon by Respondent have been repudiated by the later decisions of the circuits that have reviewed them, and particularly the Second and Ninth Circuits.

CONCLUSION

It is, therefore, respectfully prayed that this Honorable Court reverse the judgment of the Court of Civil Appeals of Texas, and remand the case to the District Court of Dallas County, Texas, for a trial on the issues of unseaworthiness and negligence.

Respectfully submitted,

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APPENDIX A

Texas Rules of Civil Procedure

Rule 277. Special Issues.

In all jury cases the court may submit said cause upon special issues without request of either party, and, upon request of either party, shall submit the cause upon special issues raised by the written pleadings and the evidence in the case, except that, for good cause subject to review or on agreement of the parties, the court may submit the same on a general charge. Such special issues shall be submitted distinctly and separately and each issue shall be answered by the jury separately, provided, that if it be deemed advisable, the court may submit disjunctively in the same question two inconsistent issues where it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exists. For example, the court may, in a workmen's compensation case, submit in one question whether the injured employee was permanently or only temporarily disabled. Where practicable, all issues should be submitted in the affirmative and in plain and simple language. It is proper to so frame the issue as to place the burden of proof thereon, but where, in the opinion of the court, this cannot be done without complicating the form of the issue, the burden of proof on such issue may be placed by a separate instruction thereon. In submitting special issues the court shall submit such explanatory instructions and such definitions of legal terms as shall be necessary to enable the jury to properly pass upon and render a verdict on such issues, and in such instances the charge shall not be subject to the objection that it is a general charge. If the nature of the suit is such that it cannot be determined on the submission of special issues, the court may refuse the request to do so, but the action of the court in refusing may be reviewed on proper exception in the appellate court, and this rule shall be construed in connection with the succeeding rule. Amended by order of March 31, 1941.

APPENDIX B

Texas Rules of Civil Procedure

Rule 272. Requisites.

The charge shall be in writing, signed by the judge, and filed with the clerk, and shall be a part of the record of the cause. It shall be prepared after the evidence has been concluded and shall be submitted to the respective parties or their attorneys for inspection, and a reasonable time given them in which to examine and present objections thereto, which objections shall in every instance be presented to the court in writing before the charge is read to the jury, and all objections not so made and presented shall be considered as waived. When written objections have been so made and presented, if the court overrules same, he shall endorse his ruling thereon and sign the same officially, and when the same is so endorsed, it shall constitute a sufficient bill of exception to the ruling of the court thereon, and when so endorsed by the judge it shall be presumed, unless otherwise noted thereon, that the party making such objections presented the same at the proper time and excepted to the ruling thereon. The requirement that the objections to the court's charge shall be in writing will be sufficiently complied with if such objections are dictated to the court reporter in the presence of and with the consent of the court and opposing counsel, before the reading of the court's charge to the jury; and are subsequently transcribed and the court's ruling and official signature endorsed thereon and filed with the clerk in time to be included in the transcript. Failure of the court to give reasonable time to the parties or their attorneys for examination of the charge shall be reviewable upon appeal upon proper exception. The judge shall so frame his charge as to distinctly separate questions of law from questions of fact, and not therein comment on the weight of the evidence, and so as to instruct the jury as to the law arising on the facts, *and shall only submit controverted questions of fact.* Amended by order of September 20, 1941, effective December 31, 1941.